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BRIEF FOR DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 143.

AUGUST G. REETZ, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

(18,236)

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THE

Supreme Court of the United States

File No. 18,236, Docket No. 143.

AUGUST G. REETZ,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Defendant in Error.

Brief for Defendant in Error.

STATEMENT OF FACTS.

This case is an appeal from the supreme court of the State of Michigan. It involves the validity of Act No. 237, of the Public Acts of the State of Michigan, for the year 1899, being "An Act to Provide for the Examination, Regulation, Licensing and Registration of Physicians and Surgeons, and for the Punishment of Offenders against this Act, &c.," the provisions of which, so far as such are applicable or necessary to the discussion of this case are as follows:

Sec. 3. On and after the second Tuesday of October, eighteen hundred ninety-nine, all men and women engaged in the practice of medicine and surgery in any of its branches, and all who wish to begin the same in the State, except as herein-

after provided, shall make application to said board to be registered and for a certificate of such registration. This registration and certificate shall be granted to such applicants as shall give satisfactory proofs of being twenty-one years of age, and of good moral character, but only upon compliance with at least one of the following conditions:

1. The applicant shall be registered and given a certificate of registration, if he shall present sufficient proof within six months after the passage of this act of his having already been legally registered, under act number one hundred sixty-seven of eighteen hundred eighty-three, as amended in eighteen hundred eighty-seven, entitled "An act to promote public health." The fee for applicants for this class shall be one dollar.

2. The applicant shall be registered and given a certificate of registration, if he shall present a certified copy of certificate of registration or license which has been issued to said applicant in any foreign nation, where the requirements for registration shall be deemed by said board to be equivalent to those of this act: Provided, such country shall accord a like privilege to holders of certificates from this board. The fee for registration from applicants of this class shall be twenty-five dollars.

3. The applicant shall be registered and given a certificate of registration if he shall satisfactorily pass an examination before the board upon the following subjects: Anatomy, physiology, chemistry, pathology, therapeutics, toxicology, histology, hygiene, public health laws of Michigan, practice of medicine, surgery, obstetrics, gynecology, diseases of the eye and ear, bacteriology and medical jurisprudence; said examination to be conducted as follows:

(a) The applicant shall pay a fee of ten dollars prior to examination.

(b). The examination shall be in writing, oral or both.

(c). The questions on all subjects except in therapeutics and practice of medicine, shall be such as may be answered alike by all schools of medicine.

(d). The applicant shall, if possible, be examined in therapeutics and practice of medicine by those members of the board belonging to the same school as the applicant; and no applicant

shall be rejected because of his adherence to any particular system of medicine.

(e). An average percentage of at least seventy-five per cent of correct answers shall be required from every candidate. No additional fee shall be charged by this board for the registration of those who successfully pass such an examination.

4. The applicant shall be registered and given a certificate of registration, if he shall present a certified copy or certificate of registration or license which has been issued to said applicant in another state of the Union where the requirements for registration shall be deemed by said board to be equivalent to those of this act: Provided, such state shall accord a like privilege to holders of certificates from this board. The fee for registration from applicants of this class shall be ten dollars.

5. The applicant shall be registered and given a certificate of registration, if he shall have a diploma from any legally incorporated, regularly established and reputable college of medicine in this State, having at least a three year's course of eight months in each year, or a course of four years of six months in each year, or within the United States, except as heretofore provided, as shall be approved and designated by the board of registration, upon payment of ten dollars, and upon complying with all other requirements of this act, such certificates conferring upon the holders of such diploma all the rights and privileges conferred by this act, without examination.

6. The board of registration shall not register any person by reason of a diploma from any college which sells, or advertises to sell diplomas "without attendance," nor from any other than a regulary established and reputable college.

The plaintiff in error was convicted upon a trial before a justice of the peace, (Rec. 3, 4) and upon an appeal to the circuit court for the County of Muskegon, was again tried befor a jury, and by them convicted.

The evidence tended to show that he had practiced as a veterinary surgeon for a number of years prior to 1890, (Rec. 15-16) that subsequently he undertook the practice of medicine, part of the time ostensibly under the direction of George S. Gordon, a regularly qualified physician. (Rec. 16).

He attended a medical college in 1891, at St. Louis, Mo., for a few months, (Rec. 14-17) and in 1898, attended the so-called Independent Medical College, at Chicago, Ill., for a period of five weeks (Rec. 14-19-20) and was by them graduated and granted a diploma. He then registered his diploma with the county clerk of Muskegon County under the provisions of Act No. 167 of the Public Acts of Michigan of 1883, which provided that "Every graduate of any legally authorized medical college in the State or any (one) of the United States or in any other Country shall be deemed qualified to practice medicine and surgery in all its departments, after having registered as provided in this act." A certified copy of this registration was sent to the state medical board, (Rec. 14-19), plaintiff in error claiming to be entitled to registration, under Sub. 1 of Section 3 of the Act of 1899. Such registration was refused by the board.

Upon his conviction, he removed his case, upon exceptions before judgment, to the supreme court of the State of Michigan, where the same was duly argued and submitted to that court for its decision thereon. The said court after due deliberation, affirmed the conviction had in the lower court, and held that the Act in question did not infringe any of the constitutional rights of the plaintiff in error and directed the said circuit court to proceed to judgment. Thereupon the plaintiff in error sued out a writ of error to this honorable Court.

ARGUMENT.

I.

Due Process of Law.

The first question raised by counsel for the plaintiff in error, is that this statute is in conflict with section 1 of the 14th amendment to the Constitution of the United States, in that said act deprives persons, including plaintiff in error, of liberty and property without due process of law, and denies to persons within the jurisdiction of the State of Michigan, including plaintiff in error, the equal protection of the laws.

This particular question was not raised in the supreme court of the State of Michigan, nor was it discussed by counsel for either side, counsel for plaintiff in error contenting himself with the argument, that this statute was not within the inherent police power of the state, and for that reason unconstitutional. It would seem, therefore, that this particular assignment although embraced in counsel's general objection made in the trial court ought not to be considered here.

Wilson vs. McNamee, 102 U. S. 572.

Edwards vs. Elliott, 88 U. S. 21.

Wood. vs. Weimer, 104 U. S. 795.

However, it seems to us that the act in question is not open to the objections taken by counsel for plaintiff in error. It is an act substantially similar to those now in force in nearly all the states, and which in every case brought before the courts for final adjudication, have been determined not to violate this provision of the federal constitution. Indeed, the objections raised by counsel are largely supposititious and imaginary. The question as to what is due process of law, is one that the courts have frequently been called to pass upon. As to cases of this character, we have found no better statement than that of Justice Field in *Dent vs. West Va.*, 129th U. S., page 114, which we here quote:

"As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms, 'due process of law' a definition which will embrace every permissible exertion of power affecting private rights and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the Crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.' In this country, the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legis-

lation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters, that is, by process or proceedings adapted to the nature of the case. The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen."

As said by this Court in *Yick Wo vs. Hopkins*, speaking by Mr. Justice Matthews: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power," 118 U. S. 356.

See also *Pennoyer vs. Neff*, 95 U. S. 714, 733; *Davidson vs. N. O.* 96 U. S. 97, 104, 107; *Hurtado vs. Cal.* 110 U. S. 516; *Mo. Pac. R. Co. vs. Humes*, 115 U. S. 512, 519.

"There is nothing of an arbitrary character in the provisions of the statute in question; it applies to all physicians, except those who may be called for a special case from another state; it imposes no conditions which cannot be readily met; and it is made enforceable in the mode usual in kindred matters, that is, by regular proceedings adapted to the case. It authorizes an examination of the applicant by the board of health as to his qualifications when he has no evidence of them in the diploma of a reputable medical college in the school of medicine to which he belongs, or has not practiced in the state a designated period before March, 1881. If, in the proceedings under the statute, there should be any unfair or unjust action on the part of the board in refusing him a certificate, we doubt not that a remedy would be found in the courts of the state. But no such imputation can be made, for the plaintiff in error did not submit himself to the examination of the board after it had decided that the diploma he presented was insufficient."

The language of this quotation is equally applicable to the case at bar. There are no arbitrary provisions in this Michigan statute. It applies to all physicians, excepting only those who are engaged in the service of the government or those who are called in from other states for consultation. It imposes no conditions which cannot be readily met; it requires from applicants only that they should possess the learning and skill necessary for the practice of their profession, and that they shall be possessed of a good moral character. Should the applicant not possess a diploma, entitling him to practice, he is authorized to apply to the registration board for an examination in the several branches of therapeutics and medicine, and if upon such examination he is found possessed of the necessary qualifications, he is entitled to a certificate, which entitles him to practice. This the plaintiff in error did not see fit to do. Whether he doubted that he possessed the qualifications, and that such examination would disclose his pretentious ignorance, we may not say. He had the right to make such application but saw fit not to avail himself of it. There is nothing in this law, from beginning to end, that makes the decision of this board final. It is subject, like the decision of all boards of this character to the due control of the courts of this state. If he believed that on the face of his certificate he was entitled to registration, he had the right to apply to the court for a writ of mandamus. If the facts were in dispute, an issue would be framed and a trial had upon the merits. The supreme court of this state had already taken jurisdiction under this statute of a similar case in *Metcalfe vs. The State Board of Registration*, 123 Mich. 661.

The same question was raised in the case of the *People vs. Hasbrouck*, 11th Utah, page 291. We quote that portion of the decision applicable to this question: "The objection that the statute attempts to confer judicial power on the board is not well founded. Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties; and in so doing they do not exercise "judicial power," as that phrase is commonly used, and as it is used in the organic act,

in conferring judicial power upon specified courts. The powers conferred on the board of medical examiners are nowise different in character in this respect from those exercised by the examiners of candidates to teach in our public schools, or by tax assessors or boards of equalization in determining, for purposes of taxation, the value of property. The ascertainment and determination of qualifications to practice medicine by a board of competent experts, appointed for that purpose, is not the exercise of a power which appropriately belongs to the judicial department of the government. It does not trench upon the judicial power. This act entitles every person whose qualifications to practice medicine, in point of learning and skill, or in point of moral character, is in any manner drawn in questions, to a hearing before the board. It would be absurd to contend that the courts must be converted into boards of medical examiners to ascertain and decide whether an individual possesses such technical knowledge or such moral character that he may be permitted to practice medicine with safety to the public, or whether the institution from which he holds a diploma is a "respectable medical college," or, on the other hand, a fraud or institution whose instruction is unfit to properly and decently prepare its graduates for practice. The determination of these and kindred questions relating to the fitness of an individual to carry on an occupation, requiring for its safe and proper conduct a person of decent moral character, or to engage in an occupation requiring special knowledge, care, and prudence, such as that of a pilot, or many others which may be mentioned, including, of course, the practice of the professions of law and medicine, may constitutionally be and is very properly devolved everywhere upon boards of inspection composed of experts in the particular occupation in question. The right of every person whose qualifications, mental or moral, are to be determined by this board, to a hearing before it, is clearly implied by the provisions for the administration of oaths and the taking of testimony "in all matters relating to its duties," and from other provisions of the act. If the board should, through malice or prejudice or dishonesty, arbitrarily refuse or revoke a license, the injured party would have his remedy by appropriate pro-

ceedings in the courts, and the board would be restrained from doing or compelled to undo the wrong. But, if the action of the board is in good faith, its final determination of qualification is not obnoxious to any constitutional provision. Due process of law is not necessarily judicial process. *Ex parte Wall*, 107 U. S. 265; *State vs. State Board of Medical Examiners*, 34 Minn. 389. A uniform rule and a uniform process for ascertaining and determining qualifications, as prescribed by this act, operating equally on all persons, affording to all persons the right to establish their qualification before the board, this is due process of law."

Counsel complains that the result of this law is to compel plaintiff in error to prove his innocence of previous violation under the law of 1883. This is not the intent of the act. He is simply required to prove his possession of the necessary skill and learning and that he is of good moral character.

Certainly these are reasonable requirements.

From an examination of these decisions, we conclude that this statute does not infringe the constitutional requirement as to due process of law.

That the board may have erred in its execution does not affect the statute. The plaintiff in error has his remedy.

We may say *passim* that a parchment purporting to be a diploma to practice medicine is not evidence *per se* that the college issuing it is a regularly constituted medical institution.

Hill vs. Brodie, 2 Stew. & P. (Ala.) 56.

And the registration of such a diploma is no evidence that the owner thereof is a legally qualified physician. In fact the converse of this proposition may be taken as true, that an institution which grants diplomas under the circumstances shown in this case is not a "legally incorporated, regularly established and reputable college of medicine," and that the owner thereof was not legally registered.

Metcalfe vs. State Board of Registration, 123 Mich. 661.

II.

Rights in a Profession or Calling.

It is undoubtedly true as a general proposition, that a person has a right to follow any calling that he may see fit, but the right to exercise that particular occupation, and the use of his property therein are subject to the higher right of the general public to be protected in the enjoyment of their rights. For that reason the particular use of property by an individual has been prevented, on the ground that such use constitutes a nuisance to the general public. This is true of slaughter houses, iron foundries, gas houses, chemical establishments, etc., and such prevention has never been held to be an interference with vested rights.

"Rights of property," says Chief Justice Shaw in *Com. vs. Alger*, 7 Cush., 53, "like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient."

"In the profession of medicine, as in that of the law, so great is the necessity for special qualifications in the practitioner, and so injurious the consequences likely to result from a want of it, that the power of the legislature to prescribe such reasonable conditions as are calculated to exclude from the profession those who are unfitted to discharge its duties, cannot be doubted."

State vs. State Medical Examining Board, 32 Minn., 324.

Hewitt vs. Charier, 16 Pick., 353.

Spaulding vs. Alford, 1 Pick., 33.

Wright vs. Lanckton, 19 Pick., 288.

Cooley, Const. Lim., 745.

In *Powell vs. Pennsylvania*, 127 U. S, 678, Justice Harlan, speaking for the Supreme Court of the United States, said: "The power which the legislature has to promote the general welfare is very great, and the discretion which that department

of the government has in the employment of means to that end very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty and property, and while, according to the principles upon which our institutions rest, 'the very idea that one may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself,' yet 'in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage.'"

Yick Wo vs. Hopkins, 118 U. S., 370.

In *State vs. Addington*, 12 Mo. App., 214, the court says: "Conceding that the fundamental right of contract is essential to the enjoyment of liberty and property, yet the state has imposed in the past, and does now impose, without question, limitations upon that right. Such limitations are found in laws against usury and gambling, in the statute of frauds and perjuries, in laws prohibiting contracts against public policy and *contra bonos mores*, in laws regulating rates of charges of railways and other public carriers, of elevators and warehouses, whether public or private. and in many others that might be named. The right of contract, like all other rights, is held subject to the necessities of the social state."

The state legislatures have the power, unless there be something in their own constitutions to prohibit it, of entirely abolishing or placing under restriction any trade or profession which they may think expedient.

Austin vs. State, 10 Mo., 593.

The prohibition of the manufacture of beer, etc., though its effect was to destroy the value of brewery property, was held valid in

Mugler vs. Kansas, 123 U. S., 623.

We again quote from *Dent vs. W. Va., supra.*

"The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorized it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation."

Allopathic State Board vs. Fowler, 50 La. Ann., 1358.

That the state has the power to regulate the practice of any profession, requiring special skill and training is apparent from the foregoing authorities, and counsel's contention that Reetz had a vested right in the practice of his profession prior to the enactment of this law of which it deprived him, is without force.

Such a doctrine rests upon the erroneous idea that the right of the individual is paramount to that of the state.

As pointed out in the cases already cited, this theory of a "vested right" is unsupported by either reason or authority. If the constitutionality of laws were to be determined by considerations of this nature, the police power of the state would only be a myth. Under the guise of a "vested right" the gambler whose earnings were "about four thousand dollars last year, and this year have been even better," might successfully defy the state to pass a law destroying or interfering with his occupation; the pugilist, the promotors of a lottery scheme, and others whose vocations are a menace to society might with equal propriety make the plea urged by plaintiff in error and if the same were to be sustained by the courts vice and crime would flourish triumphant in defiance of law.

III.

Not an Ex Post Facto Law.

Under sub-division II of his brief, on page 33, counsel contends that this act is in effect an *ex post facto* law, and cites in support thereof the cases of *Ex parte Garland*, 4 Wall., 333, and *Cummings vs. Missouri*, 4 Wall., 277.

These cases are not in point and are distinguished in *Dent vs. West Va.*, *supra*, where plaintiff in error also relied upon them, where Justice Field says:

"The Constitution of Missouri and the Act of Congress in question in those cases were designed to deprive parties of their right to continue in their professions for past acts or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their professions. The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the state."

To the like effect is the opinion of Mr. Justice Brewer in *Hawker vs. New York*, 170 U. S., 189.

Eastman vs. State, 109 Ind., 281.

State vs. Creditor, 44 Kansas, 568.

Craig vs. Medical Exrs., 12 Mont., 211.

IV.

Medical Registration and Police Power.

In the court below, plaintiff in error relied chiefly upon the point, that this registration was not within the police power of the state.

Statutes similar in character have been held constitutional, as a proper exercise of the police power in nearly every state of the Union, and by this honorable Court.

One of the leading cases is *Dent vs. West Virginia*, 129 U. S., 114, from which we have liberally quoted.

We are unable to agree with counsel for plaintiff in error in distinguishing the statute under consideration in that case, from the one in the case at bar.

The object to be attained, the machinery for carrying the law into effect are to all intents and purposes alike. We see no reason why that case should not be decisive of this.

This statute of Michigan is but an exercise of that power which enables it to promote the health, comfort, safety and welfare of society.

Ritche vs. The People, 155 Ill., 98

"Whatever difficulty there may be in defining the precise limits and boundaries by which the exercise of this power is to be governed, all agree that laws and regulations necessary for the protection of the health, morals and safety of society are strictly within the legitimate exercise of the 'police power.'"

Singer vs. State, 72 Md., 464.

"There are few professions that require more careful preparation to qualify a person to practice than medicine; and certainly there are few that more nearly concern the comfort, health and life of every citizen. In view of the important interests committed to the charge of the physician, the necessity that he should possess the necessary qualifications of learning and skill is so great, and his want of them likely to be attended with results so injurious to health and life, that the power of the state to enact such laws regulating the practice of medicine

and surgery as are calculated to exclude and protect the people from ignorant pretenders and charlatans has been established by repeated adjudications, and is now too firmly settled to admit of doubt."

State vs. Randolph, 23 Or., 74.

The following cases, in addition to those already quoted, fully sustain the constitutionalty of statutes of this character. To quote at length from them would be but to prolong this brief to undue length.

Eastman vs. State, 109 Ind., 278.

State vs. Webster, 150 Ind., 607.

Ex parte Frazer, 44 Cal., 94.

Harding vs. People, 10 Colo., 387.

Williams vs. People, 121 Ill., 84.

People vs. Blue Mountain Joe, 129 Ill., 389.

State vs. Mosher, 78 Iowa, 321.

College vs. Schrader, 87 Iowa, 659.

Driscoll vs. Com., 93 Ky., 393.

State vs. Fleischer, 41 Minn., 69.

State vs. District Court of First Judicial Dist., 13 Mont., 370.

Dogge vs. State, 17 Neb., 140.

Ex parte Spinney, 10 Nev., 323.

In re Roe Chung, (N. M.) 49 Pac., 952.

In re Smith, 10 Wend., 449.

People vs. Fulda, 52 Hun., 65.

State vs. Van Doran, 109 N. C., 864.

Barmore vs. Board, 21 Or., 301.

Logan vs. State, 5 Tex., App., 306.

Fox vs. Territory, 2 Wash. T., 297.

State vs. Carey, 4 Wash., 424.

State vs. Knowles, 90 Md., 646.

France vs. State, 57 Ohio St., 1.

State Board vs. Roy, 22 R. I., 538.

State vs. Currens, 111 Wis., 431.
State vs. Call, 121 N. Car., 643.
State vs. Hathaway, 115 Mo., 36.

In conclusion, the people claim that the law of Michigan violates no provision of the Federal Constitution. It deprives plaintiff in error of no rights without due process of law. It adds or inflicts no new nor additional penalty upon him; it is neither an *ex post facto* law, nor does it operate as an attainder. It is but the valid exercise of the police power inherent in the state. It requires but that the plaintiff in error shall possess the skill, learning and moral character necessary to the proper practice of his profession.

We respectfully submit that the judgment of the Supreme Court of the State of Michigan should be affirmed.

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